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No. 88-42

In the Supreme Court of the United States

OCTOBER TERM, 1988

OLAF A. HALLSTROM AND MARY E. HALLSTROM,
PETITIONERS

v.

TILLAMOOK COUNTY, A MUNICIPAL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether petitioners' action to enforce standards created under the Resource Conservation and Recovery Act must be dismissed because petitioners did not give the Administrator of the Environmental Protection Agency notice of this action 60 days before it was filed, as required by 42 U.S.C. 6972(b)(1).

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners own a dairy farm located next to the Tillamook County landfill in Oregon. Petitioners believe that the landfill violates standards established under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* Accordingly, on April 20, 1981, petitioners mailed a notice to the County of their intent to bring an action to compel compliance with RCRA. Petitioners, however, did not notify the Administrator of the Environmental Protection Agency (EPA) nor the Oregon Department of Environmental Quality (DEQ) of their intent to sue. Pet. App. 2a.

On April 9, 1982, petitioners filed this action against the County (Pet. App. 2a). Petitioners stated a claim under Section 7002(a) of RCRA (42 U.S.C. 6972(a)), which allows private persons to bring actions to enforce requirements established under the statute. Petitioners also set forth state-law claims for inverse condemnation, trespass, and nuisance (Pet. App. 2a).

On March 1, 1983, the County moved for summary judgment on the ground that petitioners had failed to comply with Section 7002(b)(1) of RCRA. That Section provides that no private "action may be commenced under [RCRA] * * * prior to sixty days after the plaintiff has given notice of the violation to * * * the Administrator [of the EPA and] the State in which the alleged violation occurs" (42 U.S.C. 6972(b)(1)).[1] On March 2, 1983, petitioners sent a notice of their intent to sue to the Administrator and to the DEQ. Petitioners informed the governmental agencies that they intended to refile their action if the court dismissed their case. Pet. App. 19a.

2. On April 22, 1983, the district court denied the County's motion for summary judgment. The court stated that the purpose of the notice provision in Section 7002(b), 42 U.S.C. 6972(b), was to give the administrative agencies the chance to bring their own court actions (Pet. App. 19a). Here, the court observed, the EPA and the DEQ had expressed no interest in bringing an action. The district court concluded, therefore, that "[t]o grant defendant's motion based on the notice provision would be a waste of judicial resources" (*ibid.*).

Following a trial in July 1985, the district court ruled that the County's landfill did violate standards created

[1] RCRA does not have a 60-day notice period for private actions alleging violations of the statute's hazardous-waste provisions. See 42 U.S.C. 6972(b)(2)(A) (Supp. IV 1986). This case, however, is not such an action.

under RCRA (Pet. App. 2a).[2] The court therefore ordered the County to remedy the violation within two years (*ibid.*). A jury, however, found in favor of the County on all three state-law claims (*ibid.*). The district court later denied petitioners' request for an award of attorneys' fees and expert witness fees.

3. A divided panel of the court of appeals vacated the judgment and remanded the case to the district court to be dismissed. The court ruled that the 60-day notice requirement in Section 7002(b) is a jurisdictional prerequisite to bringing a private suit under RCRA (Pet. App. 6a). The court explicitly agreed with the First Circuit in *Garcia* v. *Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1985), that "the plain language of [§ 7002(b)] commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language' " (Pet. App. 4a). The court further noted that its view of Section 7002(b) is supported by the provision's purpose "of encouraging non-judicial resolution of environmental conflicts" (*id.* at 4a-5a).[3]

In dissent, Judge Pregerson stated that "[o]ne of the purposes of the 60-day notice requirement is to allow the EPA to enforce the statute" (Pet. App. 7a). Accordingly, he would not require notice 60 days before an action is filed. Rather, Judge Pregerson "would interpret the statute to require that 60 days elapse before the district court may act" (*ibid.*). He stated that his view "furthers the goal of agency enforcement" by "allow[ing] the agency to consider the alleged violation for 60 days" (*ibid.*).

[2] The district court found that an offensive "leachate mixes with rain run-off and runs down" through petitioners' property (C.A. App. 164).

[3] The court of appeals amended its opinion on April 7, 1988, to make it clear that, because the district court lacked jurisdiction over petitioner's federal-law claim, it lacked pendent jurisdiction over the state-law claims as well (Pet. App. 14a-15a).

DISCUSSION

1. Until 1970, the major federal environmental laws could be enforced only by the government. See, *e.g.*, Clean Air Act of 1963, Pub. L. No. 88-206 § 5, 77 Stat. 396. In Section 304(a) of the Clean Air Amendments of 1970, however, Congress gave private citizens the right to bring an action to enforce emission standards established under the Clean Air Act. See 42 U.S.C. 7604(a). Section 304(b) of the Amendments provided that a citizen could commence an action 60 days after he notified the defendant and the EPA of the alleged violation. Since 1970, Section 304 of the Clean Air Amendments has served as a model for similar provisions in at least 12 other federal environmental statutes, including Section 7002 of RCRA.[4]

The courts of appeals have taken different approaches in cases where the plaintiff failed to give the required notice to the EPA. In *Garcia* v. *Cecos Int'l, Inc.*, *supra*, the First Circuit adopted the position followed by the Ninth Circuit in this case. It held that a case must be dismissed for want of jurisdiction "where the complaint is filed less than sixty days after actual notice to the agency

[4] See also Section 505(b)(1) of the Federal Water Pollution Control Act, 33 U.S.C. 1365(b)(1); Section 310(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9659(d)(1) (Supp. IV 1986); Section 16(b)(1) of the Deepwater Port Act of 1974, 33 U.S.C. 1515(b)(1); Section 11(g)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1540(g)(2); Section 105(g)(2) of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1415(g)(2); Section 12(b)(1) of the Noise Control Act of 1972, 42 U.S.C. 4911(b)(1); Section 23(a)(2) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1349(a)(2); Section 1449(b)(1) of the Safe Drinking Water Amendments of 1977, 42 U.S.C. 300j-8(b)(1); Section 520(b)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1270(b)(1); Section 20(b)(1) of the Toxic Substances Control Act, 15 U.S.C. 2619(b)(1); Section 11(b)(1) of an Act to Prevent Pollution from Ships, 33 U.S.C. 1910(b)(1).

and the alleged violators" (761 F.2d at 82). The Seventh Circuit has also taken that position in a suit by a private party against the EPA to compel the Administrator to take steps allegedly required by the Clean Air Act. See *City of Highland Park* v. *Train*, 519 F.2d 681, 690-691 (1975), cert. denied, 424 U.S. 927 (1976).

The Third Circuit has a different rule. The plaintiff in *Pymatuning Water Shed Citizens for a Hygienic Environment* v. *Eaton*, 644 F.2d 995 (1981), failed to give the EPA and state authorities notice before it commenced an action under the Federal Water Pollution Control Act. On appeal, the defendant argued that the district court should have dismissed the action. The Third Circuit disagreed. The Third Circuit held that the district court followed the correct procedure when it "stayed its proceedings until notice was given to the proper persons and entities. This stay allowed them the time contemplated by the statute for taking appropriate action" (*id.* at 997). Accord *Proffitt* v. *Commissioners, Township of Bristol*, 754 F.2d 504, 506 (3d Cir. 1985) ("sixty day notice provision should be applied flexibly to avoid hindrance of citizen suits").[5]

The Sixth Circuit apparently follows a third approach. In *Walls* v. *Waste Resource Corp.*, 761 F.2d 311 (1985), the plaintiffs failed to give the required notice before they

[5] We disagree with respondent's contention (Br. in Opp. 11-13) that the conflict in the circuits was implicitly resolved by this Court's decision in *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981). The issue in that case was whether there was an implied private right of action under the Federal Water Pollution Control Act. In resolving that issue, the Court noted (*id.* at 14) the statute's express provision authorizing citizen suits if the plaintiff gives proper notice 60 days before he files suit. The Court, however, had no occasion to address the consequences of failing to give such notice. Thus, although the Court stressed the importance of the notice provision, the Court did not decide whether an action commenced without prior notice must be dismissed (the Ninth Circuit approach) or stayed pending proper notice (the Third Circuit approach).

brought their action under RCRA. The Sixth Circuit held that the notice provision "is a jurisdictional prerequisite to bringing suit" (*id.* at 316). The court therefore held that the district court properly dismissed the RCRA claim. The court of appeals stated, however, that its decision was "without prejudice to any request plaintiff may make to file an amended complaint respecting notice" (*id.* at 317). Accordingly, the Sixth Circuit seemingly has sanctioned an approach that allows a plaintiff to give the required notice after he files suit if he then amends his complaint to include allegations of adequate notice.[6]

2. Experience shows that plaintiffs sometimes fail to give the required notice before bringing a private enforcement suit under the environmental laws. This leads to wasteful litigation over the proper procedure to follow—whether to dismiss the action or to stay the proceedings. In those circuits that have not adopted a rule, the uncertainty can be especially troubling. For example, a plaintiff's case may be stayed by the district court, later adjudicated, and then dismissed on appeal so that the district court's judgment becomes void. This Court can

[6] Contrary to the court of appeals' opinion (Pet. App. 3a), the Second, Eighth, and District of Columbia Circuits have not addressed the precise issue presented in this case. In *NRDC* v. *Train*, 510 F.2d 692 (D.C. Cir. 1974), the court allowed a suit against the Administrator to continue in the absence of prior notice because the court held that the plaintiff stated a claim under the Administrative Procedure Act, which does not require prior notice (*id.* at 703). The Second Circuit agreed with that holding in *NRDC* v. *Callaway*, 524 F.2d 79, 83 (1975). In *Hempstead County & Nevada County Project* v. *EPA*, 700 F.2d 459 (1983), the Eighth Circuit transferred an action brought under RCRA to the district court after it held that it lacked jurisdiction over the plaintiffs' claim. The court stated that the notice provision in Section 7002 had been satisfied (700 F.2d at 463) so that the plaintiffs' action could properly be commenced in the district court.

end the uncertainty and the fruitless litigation by resolving the conflict in the circuits.

Moreover, the different approaches adopted by the courts of appeals can cause significantly different results. RCRA, like many other environmental statutes, authorizes the Administrator to issue orders assessing civil fines. See 42 U.S.C. 6928(a). A private citizen may file an action to enforce such an order. But RCRA allows a citizen to bring such an action only if the defendant is currently "alleged to be in violation of any" RCRA requirement (42 U.S.C. 6972(a)(1)(A) (Supp. IV 1986)). See *Gwaltney of Smithfield* v. *Chesapeake Bay Found.*, No. 86-473 (Dec. 1, 1987). Accordingly, if a plaintiff's action is dismissed for lack of proper notice, and the defendant promptly comes into compliance with RCRA, the plaintiff may not file his action again. By contrast, if the plaintiff's case were stayed instead of dismissed, the same defendant would remain liable for civil penalties and possibly attorneys' fees in the private suit. Thus, we believe that the Court should grant the petition to resolve the conflict in the courts of appeals.

3. a. The decision of the Ninth Circuit in this case follows from the plain language of Section 7002. See generally *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (statute's "language must ordinarily be regarded as conclusive"). Section 7002(b)(1) states that "[n]o action may be commenced under" Section 7002 until "sixty days after the plaintiff has given notice" to the EPA, the state, and the alleged violator. And Rule 3 of the Federal Rules of Civil Procedure defines when an action is "commenced": "A civil action is commenced by filing a complaint with the court." Thus, a private plaintiff may not file a complaint alleging a RCRA violation until 60 days after he has given the required notice.

Section 7002 does not provide, as petitioners necessarily contend, that a plaintiff may file a RCRA claim and then give the proper notice as long as the court does not rule on the plaintiff's claim for 60 days. We can imagine such a statutory scheme, but that is not the scheme that Congress adopted. The court of appeals' decision in this case, therefore, accurately followed the language of Section 7002.

b. Contrary to petitioners' contention, the Ninth Circuit's holding is not so patently inconsistent with the will of Congress that the Court may appropriately "go beyond the letter of the statute" (Reply Br. 8). Congress patterned Section 7002 of RCRA after Section 304 of the Clean Air Amendments of 1970. The legislative history of Section 304, in turn, shows that Congress intended the notice provision to play an important role. Proponents of Section 304 were concerned that private-enforcement suits could interfere with governmental enforcement of the Clean Air Act. See *Hearings on S. 3229, S. 3466 & S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. 1184 (1970). And opponents of Section 304 testified that citizen suits could create an unproductive adversary relationship between the public, government, and industry. See *id.* at 1570. The Senate Subcommittee on Air and Water Pollution addressed those concerns by adding the provision requiring a plaintiff to give prior notice to the alleged violator and the appropriate government agencies. See 116 Cong. Rec. 32,381 (1970). Thus, as the Sixth Circuit stated in *Walls* v. *Waste Resource Corp.*, 761 F.2d 311, 317 (1985), the notice provisions in environmental statutes are "viewed by Congress as crucial in defining the proper role of the citizen suit." The notice period allows " 'the EPA, state, and violator sixty days to resolve the

problem without being harassed by a lawsuit.' " *Garcia* v. *Cecos Int'l, Inc.*, 761 F.2d at 82 (citation omitted).

In *Gwaltney of Smithfield* v. *Chesapeake Bay Found., supra*, this Court noted that one of the purposes of the notice provisions is to give the alleged violator "an opportunity to bring itself into complete compliance with the [law] and thus likewise render unnecessary a citizen suit" (slip op. 9). That purpose is not fulfilled simply by the court's not acting on a plaintiff's complaint for 60 days. As the court of appeals in this case observed, "once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise [are] less likely" (Pet. App. 5a). Accordingly, the court of appeals correctly interpreted Section 7002 of RCRA in holding that a citizen suit must be dismissed, not merely stayed, if the plaintiff did not give the required prior notice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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